Classical Stone Works, Inc. d/b/a Gothic Stone Masonry *and* Bricklayers and Allied Craftworkers Local 1 of PA/DE. Case 4–CA–31409

July 31, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

The General Counsel seeks a default judgment[1] in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge and amended charge filed by the Union on June 27 and August 28, 2002, respectively, the General Counsel issued the complaint on September 26, 2002, against Classical Stone Works, Inc. d/b/a Gothic Stone Masonry, the Respondent, alleging that it has violated Section 8(a)(1) and (3) of the Act. The Respondent failed to file an answer.

On January 10, 2003, the General Counsel filed a Motion for Summary Judgment and Memorandum in Support with the Board. On January 14, 2003, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively states that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter dated December 6, 2002, notified the Respondent that unless an answer was received within 14 days, a Motion for Default Judgment might be filed.

In the absence of good cause being shown for the failure to file a timely answer,[2] we grant the General Counsel's motion for default judgment insofar as the complaint alleges that the Respondent violated Section 8(a)(1) of the Act in certain respects, and violated Section 8(a)(3) of the Act by refusing to consider for hire or hire two employee applicants because of their announced intention to engage in organizing activity. With respect to the alleged 8(a)(3) violations, we find that the undisputed complaint allegations are sufficient to establish these violations under the standards set forth in *FES*, 331 NLRB 9, 12–16 (2000), supp. decision 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002), supp. decision 338 NLRB No. 77 (2002). See *Jet Electric Co.*, 334 NLRB 1059 (2001); see also *Budget Heating & Cooling*, 332 NLRB No. 132 (2000) (not reported in Board volumes).

Under the *FES* standards, however, the complaint allegations are insufficient to enable us to determine the appropriate remedy. In this regard, the Board held in *FES* that in cases involving more than one applicant, the General Counsel, in order to justify an affirmative remedy of instatement and backpay, must show at the unfair labor practice stage of the proceeding the number of openings that were available. 331 NLRB at 14. See also *Jet Electric Co.*, supra.

The complaint alleges that the Respondent refused to hire the two discriminatees, but does not allege how many openings were available. Because the General Counsel bears the burden of proving, at the initial unfair labor practice stage of the proceeding, that there were a sufficient number of openings available for the discriminatees, the complaint's allegations do not establish that a backpay and instatement remedy is warranted. *Jet Electric Co.*, supra. We shall therefore hold in abeyance a final determination of the appropriate remedy,[3] pending a remand of this case for a hearing before an administrative

[1] The General Counsel's motion requests summary judgment on the ground that the Respondent has failed to file an answer to the complaint. Accordingly, we construe the General Counsel's motion as a motion for default judgment.

[2] The copy of the complaint sent to Respondent by certified mail was subsequently returned to the Regional Office as "unclaimed." However, it is well established that the failure to provide for receiving appropriate service cannot serve to defeat the purposes of the Act. See *Michigan Expediting Service*, 282 NLRB 210 fn. 6 (1986). Further, according to the uncontested allegations in the General Counsel's Motion for Default Judgment, both the complaint and the December 6, 2002 letter were personally served on the Respondent's chief executive officer, Timothy Brinton.

[3] The Board does not provide the standard *FES* remedy for a refusal-to-consider for hire violation where a more comprehensive instatement and backpay remedy for a refusal-to-hire violation is appropriate. This is so because the limited remedy for a refusal to consider violation is subsumed within the broader remedy for the refusal-to-hire violation. *Budget Heating & Cooling*, 332 NLRB No. 132, slip op. at fn. 3 (2000) (not reported in Board volumes). Accordingly, whether, or the extent to which, an affirmative remedy for the refusal-to-consider violations is warranted in this case will depend on whether the evidence shows that enough openings were available to justify the more comprehensive remedy of instatement and backpay for the refusal-to-hire violation. See *Jet Electric Co.*, 334 NLRB at 1060 fn. 2.

law judge on the limited issue of the number of openings that were available to the discriminatees.[4]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Pennsylvania corporation with a facility in West Chester, Pennsylvania, has been engaged in performing masonry services in the construction industry. During the 12-month period preceding the issuance of the complaint, the Respondent, in conducting its business operations described above, performed services valued in excess of $50,000 outside the Commonwealth of Pennsylvania. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Bricklayers and Allied Craftworkers Local 1 of PA/DE is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, Timothy Brinton and David Mandrusiak held positions as the Respondent's chief executive officer and foreman, respectively, and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act.

On about April 29, 2002, the Respondent, by Timothy Brinton, by telephone, told employee-applicants: (a) that they had been dishonest by failing to disclose to Brinton that they were Union organizers; (b) that their being Union organizers presented a big problem; and (c) that he wasn't hiring any union organizers.

Since about April 29, 2002, the Respondent has refused to consider for employment or to hire employee-applicants Frederick Cosenza and Bernard Griggs. The Respondent engaged in this conduct because Cosenza and Griggs announced their intention to engage in organizing activity once they commenced employment with the Respondent.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act. In addition, by refusing to consider for hire or hire employee-applicants Cosenza and Griggs because of their announced intention to engage in organizing activity, the Respondent has discriminated in regard to the hire or tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization, in violation of Section 8(a)(3) of the Act. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(3) and (1) by refusing to consider for hire or hire employee-applicants Frederick Cosenza and Bernard Griggs, we shall order the Respondent to expunge from its files all references to the unlawful refusal to consider for hire or hire these individuals, and to notify them in writing that this has been done, and that the unlawful conduct will not be used against them in any way.[5]

ORDER

The National Labor Relations Board orders that the Respondent, Classical Stone Works, Inc. d/b/a Gothic Stone Masonry, West Chester, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employee-applicants that they have been dishonest by failing to disclose that they are union organizers, that being union organizers presents a big problem, and that Respondent would not be hiring any union organizers.

(b) Refusing to consider for hire or hire employee-applicants because they announce their intentions to engage in union organizing activities once they commence employment with the Respondent, or to discourage employees from engaging in such activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, remove from its files all references to the unlawful refusal to consider for hire or hire Frederick Cosenza and Bernard Griggs, and within 3 days thereafter, notify them in writing that this has been done, and that the unlawful conduct will not be used against them in any way.

[4] A hearing will not be required if, in the event that the General Counsel amends the complaint, the Respondent fails to answer, thereby admitting evidence that would permit the Board to resolve the remedial instatement and backpay issue. In such circumstances, the General Counsel may renew the motion for summary judgment with respect to this specific affirmative remedy. See *id.*

[5] As previously stated, we shall hold in abeyance the determination of any further appropriate affirmative remedy.

(b) Within 14 days after service by the Region, post at its facility in West Chester, Pennsylvania, copies of the attached notice marked "Appendix".[6] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 29, 2002.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the issue of how many job openings were available at times relevant to Frederick Cosenza's and Bernard Griggs' applications for work is remanded to the Regional Director for appropriate action consistent with this Decision and Order.

Dated, Washington, D.C. July 31, 2003

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT tell employee-applicants that they have been dishonest by failing to disclose that they are union organizers, that being union organizers presents a big problem, and that we would not be hiring any union organizers.

WE WILL NOT refuse to consider for hire or hire employee-applicants because they announce their intentions to engage in union organizing activity, or to discourage employees from engaging in these activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, remove from our files all references to the unlawful refusal to consider for hire or hire Frederick Cosenza and Bernard Griggs, and WE WILL, within 3 days thereafter, notify them in writing that this has been done, and that the unlawful conduct will not be used against them in any way.

CLASSICAL STONE WORKS, INC. D/B/A GOTHIC STONE MASONRY